end users. As we explained in our opening comments, special access services provided to carriers and to end users differ in important respects.[58] For example, the product mix varies in a manner that affects measured performance. Specifically, the higher capacity services primarily ordered by carrier customers are more complicated to design and provision and, accordingly, are more often subject to delays than the less complex services typically ordered by end user customers.

In addition, the ordering process used by carriers and end user customers is different because of the distinct needs and preferences of these customer groups. Carriers order special access services by submitting an access service request (ASR), which begins the service provisioning interval. Verizon then conducts a facilities check and returns a firm order confirmation (FOC) within five to seven days. The FOC contains a due date based on an estimate of when facilities will be available. End users, in contrast, often go through lengthy pre-order negotiations. The due date is not provided to the end user until Verizon has determined that facilities are in fact available, and only after that point is the end user's order entered into the provisioning system (which marks the beginning of the provisioning interval). These differences affect measured performance in two ways: First, the provisioning interval appears longer for carrier customers because it begins with submission of an ASR; however, once the pre-negotiation time for end users is taken into account, provisioning intervals for carriers and end users are comparable. Second, because Verizon returns FOCs to carrier customers even when the due date is based on an estimated construction completion date, the due date may not be as reliable as it is for end user customers, where the due date is not confirmed

[58] Verizon 17-19; *see also* letter from Marie T. Breslin, Director, Federal Regulatory, Verizon, to Elizabeth H. Valinoti, Attorney, Investigations and Hearings Division, Enforcement Bureau, FCC, dated Feb. 7, 2002.

until after Verizon has verified that construction has been completed. The Joint Commenters' proposal ignores these critical distinctions.[59]

The Joint Commenters' metrics are gravely flawed in numerous other respects. For example, the metrics improperly count projects, which should be excluded from performance metrics because the large volume of orders involved frequently results in changes in the due date at the customer's request. Moreover, projects are not submitted through ASRs; rather, each order gets an assigned due date and is individually tracked in Verizon's OSS. In addition, the entire Days Late metric (JIP-SA-5) would inaccurately reflect ILEC performance because there are several factors outside the ILEC's control that can delay rescheduling the due date.[60] The Joint Commenters' proposal also would improperly require ILECs to report diagnostics,[61] for which no need has been demonstrated, and they exceed the scope of the NPRM by including metrics related to maintenance and repair.[62]

There is also no basis for the CLEC's gratuitous claim that the proposed metrics would not involve any "significant implementation or reporting costs"[63] and could actually reduce

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[59] Given these differences, it is not surprising that faulty measures such as due dates met may show "better" results for end user customers. Such results, however, do not indicate more favorable treatment for the reasons explained in the text. There is no discrimination because the special access services provided to end user and carrier customers are not "like," and even if they were like for purposes of Section 202(a), the difference in results is reasonable. *See* Verizon at section III.B.

[60] These include situations where the carrier is not ready for retesting; the facilities vendor is not available; the ILEC has to renegotiate access to the end user's premise; and the end user may request a new date beyond Verizon's normal intervals.

[61] Joint Commenters letter at 9.

[62] The Joint Commenters propose three metrics relating to special access maintenance and repair (JIP-SA-9; JIP-SA-10; JIP-SA-11). However, the NPRM only proposed performance metrics for special access provisioning, not maintenance and repair. *See* Verizon at 14, n.31.

[63] WorldCom at 42; *see also* TWT/XO at 41-45; AT&T at 31-32, Focal at 17.

burdens on ILECs.[64] That the proposed reporting requirements would involve appreciable costs (in addition to potentially massive liability) is confirmed by CLECs' own opposition to being burdened with reporting requirements[65] as well as Sprint's understated concession that the implementation of such requirements is "not costless."[66] The argument that the new metrics would reduce burdens on the ILECs rests on the suggestion that the Commission could eliminate certain ARMIS reports.[67] The Commission already has proposed to do so, however, and those reports can and should be eliminated even in the absence of new special access performance metrics.[68]

There is no need for performance metrics, and there is certainly no basis for adopting metrics based on the Joint Commenters' proposal. If the Commission nonetheless adopts performance metrics, they must apply evenly to all facilities-based special access providers,[69] must be properly tailored to recognize the legitimate differences in the ordering process for end user and carrier customers,[70] and must sunset no later than two years after adoption.[71]

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[64] Focal at 17.

[65] TW/XO at 32; Focal at 37; AT&T at 35; Comments at PaeTec Communications, Inc. CC Docket 01-321, at 2, (filed January 9, 2002) ("PaeTec").

[66] Sprint at 9.

[67] *See* WorldCom at 24-44; TWT/XO at 41-45; Focal at 17. Focal actually proposes that the reports would reduce burdens on ILECs if the performance standards are set high enough that the states do not feel compelled to supplement them. As a threshold matter, the states lack any authority to mandate performance reports for interstate special access services. *See* section VI, below. In any event, it is at best inconsistent and at worst disingenuous for Focal to argue that the Commission can reduce the burden on ILECs by making the reports more burdensome.

[68] *See* Verizon at 20.

[69] Indeed, if the CLECs' proposed standards are really benchmarks for just and reasonable service, these same benchmarks should also apply to all carriers that are subject to Section 201(b)'s just and reasonable service obligations. *See* Verizon at 12-14.

[70] *See* Verizon at 14-19.

IV. ANY PERFORMANCE MEASURES MUST APPLY TO ALL FACILITIES-BASED PROVIDERS OF SPECIAL ACCESS SERVICES.

In our opening comments, we explained that asymmetrical performance reports would impair competition and harm consumers by imposing unique costs on the ILECs, forcing ILECs to divert scarce investment resources that otherwise could be used to expand capacity, and leading special access end user customers to draw potentially inaccurate inferences about relative service quality. We also cautioned that, given the competitive nature of the special access market, imposing disparate reporting obligations on ILECs would raise equal protection concerns and be arbitrary.[72]

The CLECs, not surprisingly, object to being included in the intrusive and overreaching reporting regime they advocate for the ILECs. In general, they argue that they lack market power or any incentive to discriminate[73] and that the costs of CLEC reporting would outweigh any potential benefits.[74] If performance measures can be justified at all, however, these arguments cannot withstand scrutiny.

If one proceeds from the untenable premise that special access competition is insufficient to constrain anticompetitive behavior, there is no reason to believe that CLECs are any less likely

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[71] *See* Verizon at 19-20. Some at CLECs claim that it would be arbitrary to have an automatic sunset date for the reports. *See, e.g.,* WorldCom at 44-46; ASCENT at 10. A sunset date is not arbitrary, however, because there is no need for the reports in the first place. Even if there were a need for the reports, a sunset date is essential to assure that they do not become yet another entrenched burden that, once adopted, becomes impossible to eliminate.

[72] Verizon at 12-14. In deciding to extend special access reporting requirements to all facilities-based providers with more than 50,000 lines, the NYPSC found that "[t]he need for applying performance metrics to all local exchange carriers is likely to become even more important as the businesses that use such service realize a need for more diversity or redundancy in light of the World Trade Center disaster." *Proceeding to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc.*, Case 00-C-2051, Order Denying Petitions for Rehearing and Clarifying Applicability of Special Services Guidelines (Dec. 20, 2001), at 13.

[73] Focal at 37; AT&T at 35; TWT/XO at 29-31 (customers can switch carriers if there are performance problems; CLECs lack an incentive or opportunity to discriminate).

[74] TWT/XO at 32.

to discriminate than ILECs. The two largest competitive providers of special access, AT&T and WorldCom, are themselves IXCs, and thus would appear to have a strong incentive to discriminate against other carrier-customers (at least by the same logic they apply against the ILECs). Indeed, as noted above, Sprint (itself a major owner of competitive access facilities) already has said that it is reluctant to purchase competitive access from AT&T and WorldCom. In addition, while AT&T and WorldCom are the most obvious counters to the contention that CLECs have no incentive to discriminate, the same point holds true for almost any significant facilities-based provider of special access services. There are very few pure CAPs any more; all competitive special access vendors offer a full range of services, including long distance, local exchange, exchange access, and high-speed Internet access. Accordingly, if any supplier of special access has an incentive to engage in discrimination, so do all – and the CLECs, which need not provide interLATA services through a structurally separated affiliate, undeniably have a greater ability than the ILECs to act on such an incentive.

The CLECs' cost/benefit argument fares no better. Although Verizon agrees that the value, if any, of mandated special access performance reports is outweighed by the burdens of preparing and filing such reports, there is no rational basis for concluding that the cost/benefit trade-off is different for ILECs than for CLECs. Certainly the size of the carrier is not a legitimate basis for distinction; vendors such as AT&T, WorldCom, and Sprint are more than capable of bearing the costs of reporting. Nor does the fact that ILECs already prepare voluntary reports (and thus collect certain performance data) alter the equation.[75]

Not only would symmetrical reporting requirements avoid distorting competition, but they would assure that the Commission structures the most unintrusive possible metrics. It is

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[75] *See* AT&T at 31.

easy for the CLECs to claim that maximum disaggregation and dozens of sub-measures are essential when their expectation is that the burden of such measures will fall only on the ILECs. If the reporting regime — and enforcement mechanisms — applied neutrally to all carriers, in contrast, the CLECs almost certainly would develop a more realistic assessment of what regulation is truly necessary and what should be left to the marketplace.[76]

The Commission should not adopt special access performance measures for any carriers, but it is imperative that any measures (and enforcement mechanisms) that are adopted apply evenly to all vendors. There is no defensible basis for singling out the ILECs for disparate treatment, and doing so would impair competition and disadvantage consumers.

V. THE COMMISSION LACKS AUTHORITY TO ADOPT A SELF-EXECUTING ENFORCEMENT MECHANISM, AND THE CLECS' SPECIFIC PROPOSALS ARE UNLAWFUL AND ANTICOMPETITIVE.

Because there is no justification for adopting special access performance metrics, there is no need to craft an enforcement mechanism for dealing with performance that does not meet those metrics. More importantly, even if metrics were adopted, an enforcement mechanism still would be unnecessary because the marketplace will assure that any supplier of poor quality special access services suffers the consequences. That does not mean, of course, that the Commission has no role in assuring that carriers comply with their Section 201 and 202 obligations. Rather, as has been true for the almost twenty years that ILECs have offered special

[76] *Federal-State Joint Board On Universal Service,* 12 FCC Rcd 8776, ¶ 48 (1997) ("Our decisions here are intended to minimize departures from competitive neutrality, so as to facilitate a market-based process whereby each user comes to be served by the most efficient technology and carrier. We conclude that competitively neutral rules will ensure that such disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhabit competition by limiting the available quantity of services or restricting the entry of potential service providers"); *see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* 14 FCC Rcd 2398, ¶ 74 (1999).

access services, the Section 208 complaint process is available to any special access customer that can prove it has received unjust, unreasonable, or unreasonably discriminatory service.[77]

The CLECs nonetheless seek to transform this proceeding into a new source of revenues — automatic, massive penalty payments from the ILECs for even minor shortfalls — while simultaneously crippling the ILECs' competitiveness through the imposition of various disabilities previously applied only to companies whose very moral character had been found wanting. Not only is this strategy antithetical to sound public policy, but it is irreconcilable with the procedural and substantive requirements of the Communications Act as well as constitutional due process protections. The Commission must reject the CLECs' shameless and outrageous enforcement proposals.

A. The Commission Cannot Create a Self-Executing Enforcement Mechanism Pursuant to Section 205.

The CLECs' ultimate goal is a self-executing enforcement mechanism that provides for payments both to the U.S. Treasury and to competitors.[78] The Commission, however, lacks authority to impose such a mechanism. The Act provides for only two ways of holding carriers accountable for violations of their statutory obligations, and both require that the defendant carrier's liability be proven before it may be held financially accountable for its actions. First, a customer (including a competitor) may file a complaint against a carrier under Section 208, and if it proves that the carrier has acted unlawfully, it may recover "the full amount of damages sustained in consequences of any such violation."[79] Second, the Commission may impose

[77] Of course, the failure to meet particular performance standards is not in and of itself unjust or unreasonable; rather, the determination of whether the statute has been violated must be a fact-specific inquiry.

[78] *See, e.g.*, WorldCom at 47-51; AT&T at 38-39.

[79] 47 U.S.C. § 206.

forfeitures against a carrier under Section 503, which are paid to the United States Treasury pursuant to Section 504.

Both Section 208 and Section 503 contain important procedural safeguards. Under Section 208, the complainant bears the burden both of proving liability and of establishing the amount of damages that it suffered. Under Section 503, the Commission must issue a notice of apparent liability; the notice must be received; the carrier against whom the notice has been issued must have an opportunity to show why no such forfeiture penalty should be imposed;[80] and the Commission must find by a preponderance of the evidence that the carrier has violated the Act or a Commission rule.[81]

Any self-executing enforcement mechanism would transgress these requirements, first, by presuming that failure to meet a metric is tantamount to violation of a statutory obligation, and second, by establishing an automatic level of damages or forfeitures, without regard to the actual harm to the competitor or the seriousness of the performance lapse. A metric may be missed because it is poorly designed or because of reasons outside the carrier's control. Moreover, and even where missed metric is attributable to the carrier, it would be arbitrary to treat any and all misses as statutory violations, regardless of their magnitude or competitive significance. Rather, the Commission has recognized that the determination of whether an ILEC's "performance meets the statutory requirements necessarily is a contextual decision based on the totality of the circumstances and information before the Commission" – not just a

[80] 47 U.S.C. § 503(b)(4).

[81] *SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, 16 FCC Rcd 19091, ¶ 41 (2001) ("*SBC NAL*") (explaining that "to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed. The Commission will then issue a forfeiture *if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.*") (emphasis added).

superficial consideration of whether specific metrics were met or not.[82] Among other things, such a determination must consider the extent to which a competitor actually has been harmed by the shortfall in performance.[83]

Certain CLECs nonetheless contend that the Commission has authority under Section 205 to compel ILECs to include both performance metrics and self-executing liquidated damage payments in their special access tariffs.[84] They are wrong: Section 205 does not countenance such sweeping action.

Section 205 empowers the Commission only to order prospective relief for violations of the Communications Act or FCC Orders.[85] Importantly, "this authority is not unlimited."[86] The Commission may take action under Section 205 only after conducting a fact-intensive investigation, and, further, only if it determines that a specific carrier's rate or practice is or will be unlawful under the Act.[87] "A hearing and finding [of an unreasonable practice or rate] are essential to any exercise by the Commission of its authority under Section 205(a)."[88]

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[82] *See, e.g., Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17513 (2001) ("*Verizon-Pennsylvania*").

[83] *See, e.g., Verizon-Pennsylvania*, 16 FCC Rcd at 17513; *Joint Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, FCC 01-338, CC Docket No. 01-194, (rel. Nov. 16, 2001), at ¶¶ 34, 104.

[84] *See* TWT/XO at 37-39; ASCENT at 8.

[85] Section 205(a) states that "whenever, after full opportunity for hearing . . . the Commission shall be of the opinion that any charge, classification, regulation or practice . . . is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe . . . the just and reasonable charge . . . and what classification, regulation, or practice is or will be just, fair and reasonable. . . ." 47 U.S.C. § 205(a).

[86] *American Telephone and Telegraph Company v. FCC*, 487 F.2d 865, at 874 (D.C. Cir. 1973) ("AT&T v. FCC").

[87] *New England Telephone and Telegraph, et al., v FCC,*826 F.2d 1101, 1104 (D.C. Cir. 1987). For example, in 1997, the Commission concluded an investigation to determine the reasonableness of LECs' special access rates, terms and conditions. *Local Exchange Carriers Rates, Terms, And Conditions for Expanded Interconnection Through Physical Collocation For Special Access and Switched Transport*, 12 FCC Rcd 18730, 18735 (1997). Only after the Commission conducted a fact-intensive investigation and found violations of the Act did it utilize its

As a procedural matter, this docket provides no basis for the Commission to take the sweeping action recommended by the CLECs. The Commission has not conducted an investigation of ILECs' special access provisioning; indeed, the Commission has not even proposed such a course of action.[89] Furthermore, no party has presented data from which the Commission could conclude that the ILECs' existing special access tariffs are unjust or unreasonable. In fact, while some CLECs gripe that the ILECs' tariffs are inadequate,[90] the remedies in the ILECs' tariffs are consistent with or better than those offered by competing providers of special access services, including the commenting parties.[91] Consequently, the Commission cannot even consider invoking its Section 205 authority unless and until it conducts the necessary factual examination of each ILEC's special access tariffs.

Even if the Commission conducted such an investigation, however, it still could not mandate inclusion of a self-executing enforcement mechanism in the ILECs' tariffs under Section 205, for four reasons. First, Section 205 only permits the Commission "to make an order

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authority under Section 205 to order prospective relief through tariff modifications. In conducting this examination, the Commission "carefully reviewed the LECS' physical collocation tariff, the direct cases and cost support that these LECs filed . . . [and] the interconnectors' and other parties' oppositions to these LECs' direct cases, and the rebuttals."

[88] *AT&T v. FCC*, at 874.

[89] *Performance Measurements and Standards for Interstate Special Access Services*, Notice of Proposed Rulemaking, FCC 01-321 ¶ 1, (rel. November 19, 2001). The purpose of the NPRM is to determine "whether the Commission should adopt a select group of performance measurements and standards for evaluating incumbent local exchange carrier performance in the provisioning of special access services."

[90] *See* AT&T Wireless at 9-11; WorldCom at 25-26; TWT/XO at 45-47.

[91] For example, Verizon offers a credit for all non-recurring charges for a missed installation due date. *See* Verizon Tariff FCC No.11, Sections 2.4.10. Based on a review of their interstate access tariffs, WorldCom, XO and Time Warner Telecom apparently have no similar provisioning guarantee. Verizon also offers a credit allowance for service interruptions that is essentially identical to those offered by WorldCom, XO and Time Warner Telecom. *Compare* Verizon Tariff FCC No.11, Section 2.4.4, *with* MCI WorldCom Tariff FCC No. 7, Section 3.8; Nextlink [XO] Tariff FCC No. 3, Section 2.6; and Time Warner Tariff FCC No. 3, Section 2.21.1.

that the carrier or carriers shall cease and desist from [a] violation"[92] and to prescribe "just, fair, and reasonable"[93] practices or charges. By its terms, therefore, Section 205 does not give the Commission license to impose self-effectuating penalties for failure to satisfy the metrics. Second, even if the Commission claimed authority to require penalty provisions in tariffs under Section 205, it may not, as explained above, make a sweeping finding that any failure to satisfy a metric or submetric is an unreasonable or unjust practice for which damages may be assessed. Third, imposing a self-executing enforcement mechanism with automatic damages would unlawfully circumvent the Section 208 process by avoiding the need for affected carriers to prove their damages.

Regardless of the extent of the Commission's authority, it bears emphasis that the Commission has never imposed self-effectuating penalties upon carriers,[94] and there is no basis for concluding that such unprecedented action is necessary here. In fact, there are compelling reasons not to do so, because requiring ILECs to include self-executing enforcement mechanisms in their special access tariffs would seriously distort competition. ILECs would be exposed to potentially crippling liability, but competition would preclude them from offsetting that risk through higher rates,[95] creating the very real prospect that the ILECs would earn non-

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[92] 47 U.S.C. § 205(a)

[93] *Id.*

[94] Carriers have voluntarily agreed to such provisions, but the Commission has never imposed liquidated damages upon non-consenting carriers. *See Application of GTE Corporation and Bell Atlantic Corporation For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032 (2000) (establishing a voluntary payment scheme proposed by the applicants as part of the Bell Atlantic-GTE merger conditions); *Ameritech Corp and SBC Communications, Inc., For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712 (1999) ("SBC/Ameritech Order") (establishing a voluntary payment scheme proposed by the applicants as part of the Ameritech-SBC merger conditions).

[95] As the Supreme Court recognized "[t]he limitation of liability [is] an inherent part of the rate." *Western Union Telegraph Company. v. Esteve Brothers Company*, 256 U.S. 566, 571 (1921); *see also Professional Answering*

compensatory returns on their special access services. Such a prospect could depress investment, since ILECs might have to establish reserves against future penalty amounts, but doing so could expose the ILECs to even greater liability to the extent it caused a decline in service quality. The CLECs, meanwhile, could continue to limit their liability, no matter how poor their performance might be. The Commission should not and may not adopt rules that invite such problems and create such disparate treatment of similarly situated competitors.

B. The Commission Cannot Impose a Self-Executing Enforcement Mechanism Indirectly By Overriding the Procedural Requirements of Sections 208 and 503.

Perhaps recognizing the inconsistency of a self-executing enforcement mechanism with the statute's requirements, the CLECs propose several back-door means of accomplishing the same objective. In particular, they suggest creative "modifications" of the Section 208 and 503 requirements that would avoid the inconvenience of compelling either the CLEC (under Section 208) or the Commission (under Section 503) to actually prove its case. These efforts are inconsistent with the Act and must be rejected.

1. Section 208

WorldCom expresses dismay that, under Section 208, "the burden of proof rests with the carrier complaining of discriminatory treatment."[96] According to WorldCom, this is intolerable in the context of special access provisioning because evidence of discriminatory or unreasonable treatment rests in the hands of the ILEC.[97] WorldCom therefore recommends that the Commission institute an expedited complaint process under which the failure to meet any metric

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Services, Inc. v. Chesapeake and Potomac Telephone Company, 565 A.2d 55 (D.C. App. 1989); *Pilot Industries v Southern Bell Telephone and Telegraph Company*, 495 F. Supp. 356, 361 (D. S.C. 1979).

[96] *See* WorldCom at 37; *see also* Focal at 33-34.

[97] WorldCom at 37.

would be noted on a form complaint, to which the defendant would have thirty days to answer. Similarly, Focal asks the Commission to establish that the failure to meet even a single performance metric will be considered rebuttable, *prima facie* evidence of unjust or unreasonable behavior.[98] Cable & Wireless goes even farther, arguing that the failure to meet a metric should be a *per se* violation of Section 206 entitling affected carriers to recover damages in an amount specified by the Commission.[99]

The Commission, however, lacks authority to presume that failure to meet a metric is tantamount to a violation of an ILEC's statutory obligations.[100] Liability under the Act must be predicated on a finding of unjust or unreasonable performance or unreasonable discrimination – that is, a violation of Sections 201(b) or 202(a).[101] It would be arbitrary to presume that a violation of one or even a handful of metrics constitutes such a violation, particularly without a showing of repeated or egregious performance shortfalls. Rather, a finding of non-compliance with the statue is inherently a fact-specific determination based on the totality of the circumstances.[102] The sole asserted justification for presuming a violation — that complainants lack access to the information assertedly needed to prove their case — is specious. The Commission's rules afford complainants ample discovery rights, enabling them to compel defendants to produce all relevant evidence.[103]

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[98] Focal at 33.

[99] Cable & Wireless at 17.

[100] The courts have rebuffed challenges to the Section 208 burden of proof allocation. *See e.g., Hi-Tech Furnace Systems, Inc. and Robert E. Kornfeld v. FCC*, 224 F.3d 781 (D.C. Cir. 2000).

[101] *See* 47 U.S.C. §§ 201(b), 202(a).

[102] *See, e.g., The People's Network v AT&T*, 12 FCC Rcd 21081 ¶ 18 (1997); *see also* text accompanying footnotes 82 and 83, *supra*.

[103] *See* 47 C.F.R. § 1.729.

Nor, contrary to Cable & Wireless, may the Commission predetermine the level of damages associated with failures to meet particular performance metrics (assuming for the moment that such failures could, under some circumstances, be considered violations of the Act for which damages may be assessed). As with liability, the amount of damages must be proven by the complainant. Establishing pre-set damages would override this fundamental statutory requirement and trample on defendants' due process rights. There is no reason to change the complaint procedures and no statutory authority for the Commission to do so in any event.[104]

2. Section 503

As with Section 208, several CLECs ask the Commission to craft new forfeiture procedures tied to violations of the special access performance metrics.[105] In particular, some CLECs urge the Commission to treat a report showing a violation as an automatic notice of apparent liability,[106] and several go on to suggest that the Commission establish an

[104] Various CLECs urge the Commission to specify that special access-related complaints will be included on the Accelerated Docket. Cable & Wireless at 23; WorldCom at 51; Focal at 33. As the Commission's rules and precedent properly recognize, however, a detailed, fact-intensive analysis must be conducted before a complaint should be admitted onto the Accelerated Docket. 47 C.F.R. § 1.730(e); *See In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934 as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Services, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, 16 FCC Rcd 6417, 6474 (1999) (recognizing that "[n]ot all accessibility disputes raised in the context of a formal complaint will be appropriate for handling under these accelerated procedures."); *Federal-State Joint Board on Universal Service; Access Charge Reform*, 14 FCC Rcd 8078, ¶ 78 (1999) ("Depending on the nature of the complaint, furthermore, a complaint filed by a party against a common carrier alleging misapplication of universal service high-cost support could qualify for resolution under the Commission's 'accelerated docket' procedures."). The Commission has never determined that an entire class of complaints should be included on the Accelerated Docket, and it should not do so here.

[105] WorldCom at 47-48; TWT/XO at 26; Focal at 32-33.

[106] WorldCom at 47-48; Focal at 32.

"extraordinarily heavy burden,"[107] under which the ILEC could not avoid a forfeiture "absent a catastrophic event."[108]

These proposals — which are equivalent to presuming that a criminal defendant is guilty and then requiring him to prove his innocence beyond a reasonable doubt — would gut the critical procedural protections of Section 503.[109] They are also inconsistent with the plain language of the Act. An NAL must be issued by the Commission[110]; a carrier cannot "self-issue" an NAL simply by submitting a report indicating that it has not satisfied a performance metric. In addition, the NAL must "identify" each statutory provision or rule that the carrier "apparently violated." Because the failure to meet a performance metric cannot automatically be considered a violation of the Act or a Commission rule, an NAL could not merely note that a carrier failed to satisfy metric X or sub-metric Y; it would have to explain why that failure indicated unjust, unreasonable, or unreasonably discriminatory service. Finally, the heavy burden that the CLECs seek to impose on a carrier wishing to dispute an NAL cannot be squared with the Act and Commission precedent. As the Commission has recognized, the burden of finally determining liability rests with the Commission, and such a finding must be based on "the preponderance of

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[107] WorldCom at 48.

[108] WorldCom at 48; *see also* TWT/XO ("[t]he Commission should refrain from imposing forfeitures in such cases only if the ILEC has missed the relevant performance standard in these cases by a statistically insignificant amount or in exigent circumstances (e.g., natural disasters).)"; Focal at 33 n.54 ("[o]nly limited types of defenses should be established for non-compliance that occurs in narrowly defined periods of emergency, catastrophe, natural disaster, severe storms or other events affecting large numbers of end users.").

[109] The Commission has recognized that the Section 503 procedures are designed to assure that constitutional due process requirements are satisfied. *See Application for Review of Stephen Paul Dunifer, Berkley, California*, 11 FCC Rcd 718, 729 (1995) (finding that "Sections 503 and 504 of the Communications Act provide safeguards which satisfy due process requirements. Specifically, the Notice of Apparent Liability (NAL) must specify the rules that are alleged to be violated, the facts upon which the charge against the violator is based, and the date upon which the alleged violation occurred. Additionally, the party is given an opportunity to respond to the NAL and to have a trial de novo."); *see also In re Jerry Szoka Cleveland, Ohio Order to Show Cause Why A Cease and Desist Order Should Not Be Issued*, 14 FCC Rcd 9857, 9863 (1999).

[110] 47 U.S.C. § 503(b)(4)(A).

the evidence."[111] The carrier therefore need only produce sufficient evidence to persuade the Commission that such a finding is unwarranted. As with Section 208, therefore, the Commission cannot create a self-executing enforcement mechanism indirectly by modifying the statutory requirements of Section 503.

C. <u>The Damages, Forfeitures, and Non-Monetary Penalties Proposed by the CLECs Are Unconscionable and Unlawful.</u>

In addition to seeking an unlawful enforcement mechanism, the CLECs propose an equally unlawful menu of monetary and non-monetary penalties for failure to meet the performance metrics. Once again, they would apply these penalties only to the ILECs; if they were potentially subject to the same punishments, they undoubtedly would find far lesser sanctions perfectly adequate to motivate appropriate performance. The recommended monetary penalties lose sight of three simple points. First, an entity is entitled only to the actual damages it incurs (and proves) as a result of a carrier's unlawful conduct. Second, the forfeiture amount must be related to the seriousness of a violation rather than reflexively set at the statutory maximum. Third, rather than being automatic, any damages must take into account extenuating circumstances, such as the effect of labor disputes, storms, and natural or man-made disasters. The non-monetary penalties constitute a laundry list of measures that improperly equate failure to meet a performance metric with either moral turpitude or malevolent intent. All of these proposals must be dismissed out of hand.

[111] *SBC NAL*, ¶ 41.

1. The CLECs' Damage Proposals Would Debilitate Rather than Compensate.

The CLECs generally urge the Commission to impose "substantial" carrier-specific damages,[112] where "substantial" is used as a code word for a fresh source of revenues for CLECs stemming from penalties that could approach an ILEC's total special access revenues.[113] Most egregiously, WorldCom suggests that the "measures of damages be three times lost revenues."[114] CLECs also argue that any carrier-specific damages be in addition to injunctive relief, tariff credits, and any damages received pursuant to the Commission's Section 208 complaint process.[115] These proposals are irreconcilable with the Act.

The Act allows an injured party to recover only those damages that it can establish were actually suffered.[116] The CLECs cite no legal authority under which the Commission could award treble damages or carrier-specific penalties in addition to damages proven under Section 208, and there is none. In effect, the CLECs seek punitive damages, which the Commission has no authority to award.[117] And, even if the Commission could assess such damages, the type of

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[112] WorldCom at 49-51; see also AT&T at 37-39; TWT/XO at 25; *but see* Comments of Mpower, CC Docket No. 01-321, at 13 ("Mpower") (recommending self-effectuating non-monetary penalties that cure problems rather than punish them).

[113] Only AT&T at 40 suggests a cap on damages (at a still excessive 40 percent of an ILEC's special access revenues).

[114] WorldCom at 50.

[115] *See* AWS at 15; ALTS at 12-13; AT&T at 40 .

[116] See 47 U.S.C. §§ 206, 208.

[117] *Just Aaron v. GTE California, Inc.*, 10 FCC Rcd 11519, 11520 (CCB 1995) (finding that "[w]e lack authority, however, under the congressional mandate accorded by our governing statute to award the punitive damages and legal expenses sought by Aaron.").

damages sought by WorldCom and other CLECs would be so excessive as to violate due process.[118]

Beyond being unlawful, awarding the type of damages sought by the CLECs would contravene sound public policy. First, the availability of excessive damages would invite spurious litigation, unreasonably sapping the Commission's and the ILECs' resources. After all, a CLEC might not judge it worthwhile to initiate legal action if it has not been seriously injured and can recover only its actual damages. When damages amount to a get-rich-quick scheme, however, the CLEC may view litigation as an attractive line of business.

Second, requiring ILECs to pay excessive damages for failing to meet performance metrics (especially in addition to the massive forfeitures sought by CLECs and damages from Section 208 complaints) would adversely affect investment. Most immediately, ILECs would be forced to pay penalties to carriers rather than investing in their networks. This could create a vicious cycle under which ever-escalating penalties cause ever-diminishing investment, which in turns causes penalties to move even higher. Even if it could, the Commission should not adopt rules engendering such consequences.

2. The Commission Should Not and Cannot Establish Base Forfeitures at the Statutory Maximum.

In addition to carrier-specific liquidated damages and damages available through the Section 208 process, CLECs ask that the Commission impose automatic baseline forfeiture

[118] The Supreme Court has explained that the due process clause imposes a substantive limit on the amount of punitive damages. *BMW of North America, Inc. v Gore*, 517 U.S. 559, 573-77 (1996). To determine whether punitive damages are "grossly offensive" and therefore unconstitutional, the Court created three "guideposts" that examine: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio between the actual or potential harm and the punitive damages; and (3) the authorized civil or criminal sanctions for comparable conduct. *Id.* Here, there is no evidence that any ILEC would intentionally violate the Commission's performance metrics or engage in any other conduct that might be deemed "reprehensible." ILECs could miss a performance metric for a number of reasons, despite exercising good faith efforts not to do so. Second, there is no evidence that missed metrics would cause such harm as to render punitive damages appropriate. Third, there are no authorized civil or criminal sanctions for failing to meet a performance metric.

penalties set at the statutory maximum.[119] The CLECs do not stop here, however; they also urge the Commission to assess the statutory maximum forfeiture penalties for each missed metric or sub-metric every month.[120] Under the CLECs' proposal, therefore, if an ILEC missed four sub-metrics in a month, even by a single percentage point, it would automatically be assessed a $4,800,000 forfeiture.

Establishing the base forfeiture amount at the statutory maximum would be arbitrary and capricious.[121] The statutory maximum penalty should be reserved for the most egregious cases of misconduct and should be applied only after the Commission has considered the nature, circumstances, extent, and gravity of the violation and the degree of the defendant's culpability.[122] Establishing the base forfeiture at the statutory maximum effectively would preclude the Commission from making any adjustments, regardless of the circumstances surrounding the performance lapse.

The arbitrariness of establishing maximum baseline forfeitures is further confirmed by the Commission's precedent. In several cases, the Commission has declined to impose the statutory maximum forfeiture where conduct was far worse than missing performance metrics. For example, the Commission has opted not to impose a statutory maximum forfeiture even

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[119] Focal at 27-29; Cable & Wireless at 15; ASCENT at 8; *see also* AT&T at 36-38. Verizon explained above why the Commission lacks authority to assess automatic forfeitures. This section demonstrates that any baseline forfeitures cannot be set at the statutory maximum.

[120] Focal at 30-31; Cable & Wireless at 16.

[121] Verizon at 23-24. To satisfy the arbitrary and capricious standard, an agency must at least reveal "a rational connection between the facts found and the choice made." *Dennis A. Dickson et al. v. Secretary of Defense et al.*, 68 F.3d 1396, 1404-05 (D.C. Cir. 1995) (quoting *Motor Vehicle Manufactures Association of the United States v. State Farm Mutual Automobile Insurance Co. et al*, 463 U.S. 29, 463 1983)).

[122] *See* 47 C.F.R § 1.80(b)(4); 47 U.S.C. § 503(b)(2)(D); *see also Applications of Liberty Cable Co., Inc. For Private Operational Fixed Microwave Service Authorization and Modifications; New York; New York,* 16 FCC Rcd 16105 ¶ 20 (2001) (imposing statutory maximum for unlicensed operations after finding that entity's history of unlawful operations was extreme, and its violations amounted to intentional misconduct).

when it has found that a carrier intentionally engaged in slamming[123] or knowingly failed to make two million dollars in contributions to the universal service fund.[124] Departing from that precedent here would be irrational.

3. There Is No Legal Basis for the Non-Monetary Penalties Sought by the CLECs.

In addition to crippling monetary penalties, the CLECs (led by WorldCom) urge the Commission to adopt egregious non-monetary penalties. The CLEC wish list includes suspension of Section 271 authority, revocation or non-renewal of Title III licenses and Section 214 authorizations, suspension of pricing flexibility, and debarment of ILECs from entering into government contracts.[125] Given that these proposed penalties bear no rational relation to failure to meet performance metrics, there can be no doubt as to the CLECs' motivation: to hamstring the ILECs' ability to compete, not just in the special access market but across the board. There is no merit to any of the CLECs' proposals, which should be summarily rejected.

Section 271 Authorizations. Under Section 271(d)(6), the Commission may suspend Section 271 authority, after notice and opportunity for a hearing, only if it finds that a BOC has ceased to meet "any of the conditions required for . . . approval" to offer in-region, interLATA services. The Commission properly has held that the BOCs' record in provisioning special access services is not part of the Section 271 analysis.[126] Consequently, there is no legal basis

[123] *AT&T Communications, Inc.; Apparent Liability for Forfeiture*, 16 FCC Rcd 16596 (2001).

[124] *Intellicall Operator Services*, 15 FCC Rcd 13539 (2000).

[125] WorldCom at 52-55.

[126] The Commission has repeatedly held that provisioning of special access services is not relevant for the purposes of determining Section 271 checklist compliance. *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4126-27 (1999); *Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271*

for suspending Section 271 authority as a penalty for failure to meet special access performance metrics.

Title III licenses and Section 214 authorizations. Under Section 308(b), the Commission evaluates whether an applicant or existing licensee has the requisite character and fitness to hold a license. This assessment examines the "behavior which is truly relevant to . . . licensing,"[127] including information that would shed light on an applicant's future truthfulness and reliability.[128] Failing to satisfy special access performance metrics has no conceivable relation to an ILECs' fitness and character to hold a Title III license or Section 214 authorization. Indeed, the Commission has rejected previous challenges to an ILEC's character when the alleged misconduct had no bearing on the applicant's fitness to hold a license.[129]

Pricing Flexibility. When an ILEC files a petition for pricing flexibility, the Commission gives all interested parties the opportunity to dispute the ILEC's showing. If the ILEC meets the relevant competitive benchmarks, it receives pricing flexibility. The ILECs' own provisioning of special access is irrelevant to the process.

Government Contracts. The Commission has no authority to debar ILECs from bidding on government contracts. Moreover, doing so as a penalty for missing performance metrics

(Continued . . .)
of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, 15 FCC Rcd 18354, 18520 (2000).

[127] *See Policy Regarding Character Qualifications in Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees*, 102 FCC 2d 1179, 1181 (1986).

[128] *SBC/Ameritech Order*, 14 FCC Rcd at 14947-48.

[129] *See e.g., Applications of NYNEX Corporation and Bell Atlantic Corporation For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, 20092-93 (1997); *see also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation To SBC Communications, Inc.*, 13 FCC Rcd 21292, 21305-06 (1998) (rejecting argument that SBC was previously found liable for violating antitrust laws raised questions about SBC's character to hold a license).

would violate the relevant government regulations, which state that "[t]he seriousness of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection *and not for purposes of punishment.*"[130]

The Commission must resist these blatant efforts to game the regulatory process. They are unquestionably unlawful and shamelessly self-serving.

D. <u>The Commission Should Not Require ILECs To Undergo Audits.</u>

Not content with exposing the ILECs to massive damages, maximum forfeitures, and various non-monetary shackles on their ability to compete, the CLECs further urge the Commission to require ILECs to undergo (and generally pay for) a variety of audits of their performance reports — which, of course, would produce still further fines if they revealed inaccuracies.[131] We have already explained at length why there is no need for performance reports in the first place. If the Commission nonetheless adopts reporting requirements, it must not adopt auditing requirements as well. Doing so is unnecessary and would be unduly burdensome. Audits are massively expensive – in Verizon's experience, audits can cost millions of dollars, even before taking into account the more severe impact of the drain of resources which audits cause to Verizon's business – and would accomplish nothing more than imposing still more costs on ILECs, further diminishing their ability to compete in the special access marketplace.

The CLECs already have their own records of the ILECs' special access provisioning. If they believe there is a discrepancy between their records and the ILECs' reports, they should try to resolve that discrepancy with the relevant ILEC. If they remain unsatisfied, they can bring the

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[130] 48 C.F.R. § 9.402(b) (emphasis added).

[131] WorldCom at 51-52 (quarterly, optional audits by each carrier customer and independent annual audits); TWT/XO at 27; ALTS at 12; Focal at 36 (third-party random and for-cause audits paid for by the ILEC).

matter to the Commission. Giving CLECs a right to request periodic audits provides yet another means for them to increase the ILECs' costs and tie up resources that would be better spent responding to customers and investing in the network.[132] (Verizon has dozens of carrier-customers of special access. If each elected to conduct a quarterly audit, we could not possibly respond to all the requests and still keep the underlying business running smoothly.) In addition, ILECs already are subject to numerous audits, including a biennial Section 272 audit that addresses what the CLECs apparently view as the key issue in this proceeding — alleged discrimination between the ILEC's Section 272 affiliate and other special access customers. Additional audits would be wasteful and counter-productive.

VI. STATES CANNOT IMPOSE THEIR OWN PERFORMANCE MEASURES AND PENALTIES FOR INTERSTATE SPECIAL ACCESS SERVICES.

Focal asks the Commission to clarify that the federal special access performance rules should be a "mandatory minimum" that states can supplement by, for example, imposing additional requirements and penalties.[133] Not only should the Commission decline to issue the requested clarification, but it should reaffirm that the states have no jurisdiction over interstate special access services.[134] Under Section 2(a) of the Act, those services are subject to regulation only by the Commission. Focal cannot bootstrap state jurisdiction by suggesting that special access services may be used as a substitute for UNE loops.[135] Even if they are put to such use,

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[132] The burden is not mitigated by WorldCom's suggestion that the CLEC pay for the audit unless it reveals inaccuracies. No matter how good the ILEC's processes are, there are likely to be occasional discrepancies in the data. WorldCom does not suggest a materiality component; rather, any inaccuracy would shift responsibility to pay for the audit from the CLEC to the ILEC.

[133] Focal at 14-18

[134] *See* Comments of Qwest Communications International, CC Docket 01-321, at 16-19 (filed January 22, 2002) for an elaboration of the reasons the states cannot regulate any aspect of interstate special access services.

[135] Focal at 19.

special access services remain jurisdictionally interstate. A state could no more regulate the terms and conditions (including the service quality) of an ILEC's interstate access services than it could regulate the rates of those services.

VII. CONCLUSION

The Commission should not adopt special access performance reporting requirements and enforcement mechanisms.

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